Filed 8/5/15 In re D.S. CA6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re D. S., a Person Coming Under the Juvenile Court Law.	H041611 (Santa Clara County Super. Ct. No. JD21214)
SANTA CLARA COUNTY DEPARTMENT OF FAMILY AND CHILDREN'S SERVICES, Plaintiff and Respondent, v. N. J. et al., Defendants and Appellants.	

I. INTRODUCTION

The biological parents (Mother and Father) of D. S. (Minor) appeal from an order terminating their parental rights and selecting adoption as the permanent plan 31 months after Minor was removed from Mother's custody while Father was incarcerated.[1] After a contested permanency planning hearing held over several days from August through October 2014, the juvenile court concluded that Mother had failed to present a compelling reason to preserve the legal parent-child relationship. Mother did not show

[1] Father's opening brief on appeal simply adopts the factual statement and arguments in Mother's opening brief, as authorized by California Rules of Court, rule 8.200(a)(5). Accordingly, we will refer to the arguments on appeal as made by Mother.

that she occupied a parental role in Minor's life or that the benefits of continuing the relationship would outweigh the benefits of adoption.

On appeal Mother contends that she presented evidence of a "compelling reason" to avoid terminating her parental rights, specifically that she "maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (Welf. & Inst. Code, § 366.26, subd. (c)(1)(B)(i).)[2] For the reasons stated below, we will conclude that Mother failed to present evidence compelling the juvenile court to reject adoption as the permanent plan after terminating Mother's parental rights.

II. FACTUAL SUMMARY

The contested permanency planning hearing was preceded by a five-day placement trial. After the placement trial, the juvenile court denied a joint section 388 petition by Mother and Father requesting Minor's placement with a maternal great aunt and instead placed her with a couple whom the court found to be nonrelative extended family members. Mother and Father filed an appeal (H041219) from that placement decision that this court has considered together with this appeal.[3]

In that opinion we have extensively reviewed the proceedings from an initial detention hearing in May 2012 through the placement trial in June 2014. We noted familiar landmarks of dependency proceedings, the uncontested jurisdiction/disposition hearing in June 2012, the six-month review hearing in January 2013, the 12-month review hearing in July 2013, the 18-month review hearing in November 2013, the scheduling of a section 366.26 selection and implementation hearing for March 2014, and the deferral of that hearing until after the placement trial.

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[2] Unspecified section references are to the Welfare and Institutions Code

[3] On May 8, 2015, we granted the Department's request to take judicial notice of the records in that pending appeal. On July 2, 2015, we ordered the cases to be considered together for disposition.

Here we will review the post-placement proceedings more thoroughly, but the earlier hearings are relevant to this appeal only insofar as they illuminate the evolving nature of the relationship between Mother and Minor.

Minor was taken into protective custody and placed in foster care in mid-May 2012 because Mother was neglecting her needs. Mother, then 31 years old, had apparently relapsed into chronic use of methamphetamine and was evading drug tests by social workers. She was also bringing Minor to school an hour late without the leg and arms braced necessitated by Minor's cerebral palsy and picking her up about three hours after school ended.

In a report prepared for the jurisdiction/disposition hearing, social workers said that Mother rejected the option of adoption and intended to do whatever was required to reunify. Minor's visits with Mother and Minor's half-sister, supervised by Mother's mother, were going well. Minor was initially upset as visits ended, but she was beginning to bond with her foster parents. Mother and Father submitted to jurisdiction and disposition based on the social workers' reports. The court found true the allegations in an amended petition and declared Minor a dependent of the court, removing her from Mother's custody. The court ordered Mother and Father, among other things, to submit to random drug testing, to submit an "aftercare relapse prevention plan" to the social worker, and to participate in and complete reunification services including substance abuse counseling, a substance abuse self-help program, and parenting classes.

By the time of the six-month review hearing, neither Mother nor Father had made much progress on their case plans. Father was inhibited by incarceration, which had changed from jail to prison. Mother was living with friends and relatives in Salinas and had not been actively engaged in her case plan. She had canceled numerous appointments with the social worker and had not actively sought a bed at an inpatient program. Mother would have difficulty meeting Minor's medical needs because she did not have reliable transportation or a stable home environment. She thought it best for

Minor to remain in foster care. She wanted to defer her case plan until she had a stable living situation.

Minor remained with her foster parents, had bonded with them, and was doing well, receiving physical therapy and counseling. She was happy during weekly visits with Mother and her older sister and appeared to love them very much. She was occasionally sad and worried about Mother's well-being.

At the six-month review hearing, the court found that the Department had not provided reasonable services to Father. The court ordered continuation of reunification services for Father and Mother, their completion of their case plans, and Minor's continued placement in foster care.

In March the juvenile court granted a request by the foster parents to be deemed de facto parents.[4]

A report and two addenda prepared by social workers for the 12-month review hearing noted Mother's progress on her case plan after the six-month review hearing. She attended Dependency Wellness Court (DWC) hearings slightly more than once a month from February through May 30, 2013, and had completed the first phase of DWC. She was complying with the rules of a transitional housing unit where she resided in San Jose; participating in individual counseling, a parenting class, and a 12-step program; maintaining sobriety and passing weekly drug tests; and receiving outpatient treatment.

Meanwhile, Father had made little progress on his case plan due to his incarceration, although he was participating in AA/NA meetings. His incarceration was expected to continue through the time of the 18-month review hearing.

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[4] "'De facto parent' means a person who has been found by the court to have assumed, on a day-to-day basis, the role of parent, fulfilling both the child's physical and psychological needs for care and affection, and who has assumed that role for a substantial period." (Cal. Rules of Court, rule 5.502(10).)

Minor had bonded with her de facto parents and was doing well. She was happy and outgoing during biweekly visits with her mother and older sister and appeared to love her mother very much. She was no longer worried about Mother because Mother had a place to live and was doing well in treatment.

At the 12-month review hearing, the court adopted the social workers' recommendations and continued reunification services for Mother while terminating them for Father after finding that both had been provided reasonable reunification services and that there was no substantial probability that Minor would be returned to Father's custody within 18 months of her removal from Mother's custody.[5]

A report and two addenda prepared by social workers for the 18-month hearing noted Mother's progress and also her relapse. She attended nine DWC hearings between July 11 and November 21. Mother completed her stay in a transitional housing unit near the end of October 2013. She was employed in San Jose as a waitress with a graveyard shift of 11 p.m. to 6 a.m. She had relapsed by taking Adderall, a prescription stimulant offered by a coworker to combat fatigue at work. The DWC team praised her honesty when she reported her relapse, but due to her relapse, she was not accepted into a sober living environment. Mother had canceled some visits with Minor due to oversleeping and exhaustion from work. For the same reason, Mother said she had missed four chemical tests from August through October. The tests she did take were negative. Mother had attended medical appointments with Minor to learn about the care Minor needed.

[5] Father appealed from the termination of services to him and this court affirmed the order in an unpublished opinion (H040034) filed on July 11, 2014 after finding that Father had been provided reasonable services in prison and that terminating further services was not an abuse of discretion. On May 8, 2015, we granted the Department's request to take judicial notice of that appeal.

Mother said she was not ready to reunify because her recovery was not strong, her housing situation was unstable, and she was unable to find child care to accommodate her work schedule. She hoped to receive six more months of services.

Minor was doing well and bonded with her de facto parents, calling them " 'grandpa' " and " 'grandma.' " Minor was happy and outgoing after twice weekly visits with Mother.

Between October 15 and October 23, 2013, the Department's recommendation changed from continuing reunification services to terminating services for Mother. At the 18-month review hearing in November 2013, the court adopted the social workers' recommendation and terminated reunification services. Mother was allowed two unsupervised two-hour visits per week and Minor's half-sister was allowed reasonable visitation.

The age of Minor's de facto parents precluded them from adopting her or becoming her legal guardians, so the Department looked for an alternative placement. At the end of October 2013, Pamela and David, a couple in the church community of the de facto parents, expressed interest in adopting Minor and began visits with her. Great aunt Gayle presented herself to a social worker in mid-January 2014 as interested in adopting Minor after hearing about the termination of services to Mother around Thanksgiving. Minor's first visit with Gayle was on March 1, 2014.

A report prepared for the section 366.26 hearing scheduled in March 2014 noted Mother's disengagement from the dependency proceedings. She was discharged from DWC in February 2014 after again missing a hearing as she had once in December and twice in January. After termination of services, she discontinued chemical testing, dropped out of touch with the social worker, and did not visit consistently with Minor. Mother told the social worker she was preoccupied with working her graveyard shift in San Jose and coming home to Salinas to sleep. She called him to arrange visitation when it was possible for her.

According to the report, Father was released on parole in December 2013 and had tested positive for methamphetamine that month and in February 2014. Another failed test would result in revocation of his parole. He had missed a scheduled visit with Minor and tried to attend one of Mother's visits, but was told it was not his turn.

Minor appeared to enjoy her visits with her parents. She was in first grade and said she had many friends at school.

The social workers' initial section 366.26 report and an addendum in mid-March 2014 recommended terminating the parental rights of Mother and Father and appointing great aunt Gayle as Minor's foster adoptive parent. The initial report focused on Gayle to the exclusion of mentioning Minor's visits with Pamela and David.

On March 20, 2014, the court did not select a permanent plan or terminate parental rights, instead scheduling a mediation the following month. After the mediation in April was unsuccessful, the court scheduled a long cause trial on placement and a section 366.26 hearing for June 9, 2014. The court later set the section 366.26 hearing to trail the placement trial.

In May, Mother attended supervised visits on the 9th and 15th, but visits for the 3rd and 16th were cancelled because she overslept and did not call to confirm. Visits on the 29th and 30th were canceled because Minor had head lice. Mother missed a visit with Minor on June 5 because she did not call to confirm in time.

After the unsuccessful mediation, the social worker involved in the case was reassigned and a new social worker, Meendering, prepared a second addendum to the section 366.26 report. The second addendum continued to recommend termination of parental rights, but recommended adoption by Pamela and David. The addendum revealed that Minor had become very anxious about continuing visits with Gayle. During the five-day placement trial there was testimony that Minor's anxiety began after her maternal grandmother had questioned her during an April 1 visit about why she did not want to live with her family and after Minor got the impression for the first time during

an April 19 visit at Gayle's residence, observed by the social worker, that it was expected to be her permanent residence.

On the Friday before the placement trial began, Minor asked Meendering about court. Meendering told her that she was not going to be in court and asked her if there was anything she would like Meendering to tell the judge. Minor said, " 'I know my family wants me to visit with them and live with them, but I don't want to.' " When asked directly, Minor said, " 'I want to live with [Pamela's family]. I don't want to visit with Gayle and I don't want to live with her.' "

PERMANENCY PLANNING HEARING

After the placement trial, a contested section 366.26 hearing was scheduled for August 4. At a July hearing, the court declined Mother's request to appoint an expert to perform a bonding study, but allowed Mother to get an expert to observe a visit with Minor.

According to a third addendum to the section 366.26 report prepared at the end of July, Mother was often late for scheduled visits and had missed one on July 18 because she did not call to confirm the visit in time. Mother and Minor showed mutual affection during the visits and worked together closely on art projects. Minor appeared to genuinely love her half-sister and Mother, looked forward to their visits, and enjoyed spending time with them.

The permanency planning hearing began on August 4 with testimony from Dr. Mangiameli, a clinical neuropsychologist who testified on Mother's behalf. After he testified, the hearing was continued until August 28. On August 28, the court heard testimony from social worker Meendering and Mother. After they testified, the hearing was continued until September 22 and continued again because Father was recently incarcerated in Monterey County on a parole hold. On October 1, the hearing was continued again due to the unavailability of the judge. On October 20, social worker

Nathan Thomas testified and the court heard argument from the Department, Mother, Father, and Minor.

1. Trial Testimony

Mother testified that she was Minor's primary caretaker from birth until Minor was removed from her custody at the age of five, except for about five weeks when Mother was incarcerated. Mother admitted that she had been neglecting Minor as alleged in the Department's original petition. Mother was taking medication for mental issues and was forgetful. Mother admitted she has a substance abuse problem, but said in August 2014 that she had been clean and sober for the past month and was attending meetings. She acknowledged she had missed some of the twice weekly visits she was allowed with Minor.

When Mother was in transitional housing before reunification services were terminated, she had unsupervised visits twice a week. Because Mother did not have a vehicle, their options were limited, but they would usually go to a mall or a park. During more recent supervised visits, Minor called her "'Mom.'" Minor jumped on her and hugged her and wanted to be tickled. Minor rested her head on her. She wanted to be rocked like a baby. Minor asked Mother for help during visits.

Based on Mother's experience of being adopted by her grandmother and not seeing her own mother, she believed that adoption would affect Minor when she was a teenager and later in life.

The court accepted social worker Meendering as an expert in permanency planning, adoption, and bonding. She had worked with dependent children for 13 years, including nine years with the Department.

Meendering acknowledged that Mother visited consistently with Minor before her drug relapse and termination of reunification services. Since that termination, Mother had averaged about one visit a month. After Mother requested more visits in early May 2014, she had missed five visits and often arrived near the end of the 15-minute grace

period. Meendering stated that Mother did not appear to be maintaining sobriety. She occasionally appeared forgetful and glassy-eyed.

A week before Meendering's testimony, when the foster mother supervised a visit with Mother and Minor got scared playing tag, she ran to her foster mother, not Mother, and called the foster mother "Mom." The foster parents reported that Minor did not react visibly when Mother canceled a visit.

Minor told Meendering she wanted to be adopted by Pamela and David, with whom she had been building a relationship since October 2013. She has chosen to call them "'Mom' and 'Dad,'" though they did not ask her to call them anything in particular. Meendering did not believe that Minor was aware she might never see her biological family again after adoption.

According to Meendering, there are four kinds of attachment: secure, ambivalent, avoidance, and disorganized, which is a mixture of avoidant and ambivalent. There are four signs of secure attachment: wanting to be with that person, seeking the person for comfort, perceiving the person as a secure base, and exhibiting distress when not with that person. According to Meendering, Minor has a secure attachment to her caregivers and a disorganized attachment to Mother. Minor tried to take care of Mother and took responsibility for the family's negative feelings.

To Meendering, the bond between Mother and Minor was more of a peer relationship than parental. Minor played with Mother like a peer and did not necessarily listen like she would to a parental figure when told not to do something. Minor did not look to Mother for day-to-day care or for stability. Meendering had observed only one visit, but she had communicated with the social worker who had supervised the visits.

Meendering acknowledged there would be a loss if the bond with her Mother were severed, but believed Minor could work through it and overcome it with her therapist. "It wouldn't outweigh the benefits that she would get from being adopted." Among the benefits of adoption are "knowing where your forever home is going to be" and

"[k]nowing that there's always going to be someone there to take care of you consistently every single day, and that they can't be taken away." Adoption is more permanent than guardianship, which could be undone. Minor may not understand the difference right now, but she could learn it. In guardianship, continued exposure to Mother and the uncertainties of their relationship could affect Minor's emotional well-being and sense of stability.

Dr. Mangiameli, a clinical neuropsychologist who has specialized in child development and the biological foundation of attachment theory, was retained to assess the existence, strength, nature, and health of the parent-child bond. He reviewed the court records and spoke with Mother, Father, Minor's half-sister, Meendering, and Mother's counsel. His request to speak with Minor was denied. The court accepted Dr. Mangiameli as an expert in neuropsychological assessment and attachment theory. Mangiameli was initially put off by Mother's tattoos and piercings, but what he observed was a healthy bond between Mother and Minor.

Both Mangiameli and Meendering observed the same supervised visit between Mother and Minor in July 2014. Mangiameli watched through a one-way mirror at the Department's office. Meendering observed from inside the room, because Minor had asked her to stay at the beginning of the visit, while Mother was in the restroom. Meendering sat apart from Mother and Minor so as not to interfere with their interactions.

Mangiameli and Meendering had different perspectives on this visit. Meendering acknowledged that Minor sought physical affection from Mother. During part of the visit, they applied makeup to each other. Minor pressed hard on Mother's eye while applying makeup, and Mother did the same in turn to show Minor how it hurt.

Mangiameli thought that Minor demonstrated "a remarkable level of maturity" in the concern she exhibited for Meendering's other obligations when she asked Meendering to join her in her art projects. He noticed that Minor called Mother "Mom" a couple of times. Minor acted familiar with Mother by sitting near her, resting her head

on Mother's head, and spontaneously kissing her cheek twice. Several times during the visit, Minor broke away from what she was doing with Mother to see what Meendering was doing and then returned to Mother. To Mangiameli, this revealed a secure attachment to Mother.

Mangiameli thought that Mother acted in a parental role when Minor was applying makeup to Mother somewhat forcefully. Mother escalated her responses to get Minor to stop. Mother also guided her in two craft projects as a parent would. They collaborated on cleaning up the room at the end of the visit, with Mother leading Minor.

Mangiameli's observations were consistent with attachment theory, which he explained as a widely accepted theory explaining the uniqueness of the parent-child bond.

> [I]f you give credence, as I do, to the biological foundation that, you know, start[s] with Mommy producing oxytocin that affects how she relates to other people, and that she conveys that in her [m]other's milk to her child, who then takes up that oxytocin, that level of bonding that gets hard-wired so early on and then is sustained over the life span of the child in most instances, healthy or otherwise, that is of a different character than other attachments that are formed, even though they may be very strong and healthy.

It is possible to have attachments to a caregiver and to other people, but they are not the same. Minor can get good parenting from someone else, but not a parental bond.

There is a convergence of psychological literature saying preserving a parental bond that is "faintly healthy[] is protective against problems that a child may encounter and may develop as they mature … ."

> [R]esearch that has shown us that when parental bonds are abruptly terminated, almost at any age, but particularly up through about 14, that it's been shown that they have – the child almost immediately tends to have remorse and guilt and discomfort, and no matter how untrue it is, a sense of responsibility for the loss of the relationship.

This was consistent with his observations, even in cases of incest.

When a parental bond is terminated, a child's reaction begins with fear, despair, and remorse, and it leads to promiscuity with early pregnancy and sexually transmitted

diseases. As adolescents they are more oppositional and they "have a much more difficult time developing healthy, interpersonal relationships, particularly with people of the opposite sex … ."

Secure attachment can occur in awful conditions. When it exists, there is emotional resilience and adaptability. Minor "has shown a remarkable adaptability to new situations." Minor has functioned well without a permanent home, so it "is not essential to her having healthy development."[6]

Mangiameli acknowledged that "[t]here is definitely an advantage to having a stable living environment for a child, but it is one of many factors, and it is not the most highly weighted one for most children." The most highly weighted is "[t]he parent/child bond." Mangiameli believed a strong bond could survive intermittent visitation, so consistency in visitation was not an important factor in his assessment.

He believed it would be appropriate to terminate a parental bond if the child exhibited "extreme anxiety" or "fearfulness" in the parent's presence.

Mangiameli could not speculate about whether long-term foster care would be detrimental to Minor. He acknowledged that some mitigating factors can lessen the negative impacts of losing a parental bond, but he was not familiar with them.

The court accepted Nathan Thomas as an expert in permanency planning, child development, attachment theory, and risk assessment. Thomas was the supervising social worker at Legal Advocates for Children and Youth (LACY), the organization that was representing Minor in this case.

Thomas had no opinion on whether adoption or guardianship was better for Minor. He testified only to critique Mangiameli's assessment.

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[6] As the Department pointed out in argument to the juvenile court, "His opinion was inconsistent with the legislative mandate for permanency."

Thomas said that Mangiameli's version of attachment theory was dated. While neurobiology may account for early life attachments, an older child is affected by other factors. More contemporary research gives credit to secondary attachments, such as with daycare providers, and recognizes the existence of more than one attachment. A secondary attachment can mitigate the effects of disruption of the primary attachment. In attachment theory, "secondary" means second in time to "primary," not necessarily second in strength or importance.

Thomas faulted Mangiameli for not performing a more global assessment of Minor by evaluating her behavior at school and in her foster home. He also criticized Mangiameli for not interviewing Minor. He was not aware that LACY had rejected Mangiameli's request to interview Minor.

2. Juvenile Court's Ruling

The juvenile court stated as follows.

> In order to meet this burden [of avoiding termination of parental rights due to a beneficial parental relationship], the parent must show more than frequent and loving contact, or an emotional bond with the child, pleasant visits. The parent must show that he or she occupies a parental role in the life of the child. And, finally, continuing this relationship outweighs any of the benefits that adoption affords.
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> In this case the Court finds that [Mother] has failed to meet her burden of proof as to both prongs with respect to the beneficial parental relationship. It is clear that [Minor] and [Mother] ha[ve] shared frequent and loving visits, although at times inconsistent, and that they do share an emotional bond as well. And, quite honestly, the Court would [not] be really be able to sever[] that.

Minor had been removed from Mother's custody two years earlier, at age six. "[P]resently, [Mother] does not occupy the role of the parent." Minor "looks to her current caregivers for satisfying that role of a parent." Minor expressed a desire for a stable home and a fear of expressing her wishes honestly because her family would perceive divided loyalties.

> With respect to the expert testimony as it relates to the bond, the Court was most persuaded by the social worker, Ms. Meendering's testimony. I found her testimony to be credible and reliable based on her knowledge, her experience and based on the understanding of the familial relationship, and her experience and her knowledge and understanding of most importantly, [Minor].
>
> So based on those findings the Court finds that there is no compelling reason for determining that termination would be detrimental to [Minor].

The court also found that the sibling relationship was not so significant or extraordinary as to outweigh the benefits of adoption.

The court followed the recommendations in the social workers' report and found that its orders were in Minor's best interest. The court terminated the parental rights of both parents and selected adoption as the permanent plan and the current caregivers as the prospective adoptive placement.

III. DISCUSSION

When it appears at or after a 12-month review hearing that, despite reasonable reunification services being offered, a parent has not made significant progress in resolving problems that led to a child's removal and there is no substantial probability of the child's successful return to parental custody, the juvenile court must terminate reunification services and schedule a section 366.26 hearing. (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 249 (*Cynthia D.*); §§ 366.21, subds. (g)(4), (h) [12-month review hearing] 366.22, subds. (a), (b)(2) [18-month review hearing].) After termination of reunification services, the statutory goal is to provide a stable, permanent home (§ 366.26, subd. (b)), preferably by terminating parental rights and selecting adoption as the permanent plan for the child. (*Id.* at subd. (b)(1); *In re Celine R.* (2003) 31 Cal.4th 45, 53 ["if the child is adoptable … adoption is the norm."]; *In re Jose V.* (1996) 50 Cal.App.4th 1792, 1798; *In re C. B.* (2010) 190 Cal.App.4th 102, 121-22.)

Two judicial findings are required to justify terminating parental rights at a section 366.26 hearing: that reunification services have been terminated and there is clear and

convincing evidence "that it is likely the child will be adopted … ." (§ 366.26, subd. (c)(1); *Cynthia D., supra*, 5 Cal.4th at pp. 249-250.) In the juvenile court, the burden of establishing probable adoption by clear and convincing evidence is on the social services agency. (Cf. *In re Thomas R.* (2006) 145 Cal.App.4th 726, 731-732.)

Upon such a showing, "the court shall terminate parental rights unless … [¶] (B) The court finds a compelling reason for determining that termination would be detrimental to the child due to one or more of the following circumstances: [¶] (i) The parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1).) The party claiming an exception to termination has the burden to establish a compelling reason to avoid termination. (*In re Thomas R., supra*, 145 Cal.App.4th 726, 731; *In re I. W.* (2009) 180 Cal.App.4th 1517, 1527; *In re C. B., supra*, 190 Cal.App.4th 102, 122.) Specifically, it is the parent's burden to show that judicial termination of their beneficial relationship would be detrimental to the child. (*In re Erik P.* (2002) 104 Cal.App.4th 395, 401; *In re C. B., supra*, at p. 122.) "If the court finds that termination of parental rights would be detrimental to the child … , it shall state its reasons in writing or on the record." (§ 366.26, subd. (c)(1)(D).)

A. STANDARDS OF REVIEW

The existence and nature of a parent-child relationship is essentially a factual question. To the extent the juvenile court makes express or implied findings about a parent-child relationship, on appeal we defer to those findings that are supported by substantial evidence. (*In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314.) It is not our function to reevaluate the credibility of witnesses or reweigh the evidence. (*In re C. B., supra*, 190 Cal.App.4th 102, 127.)

However, when the juvenile court finds that a parent has not met his or her burden to prove the existence of a parent-child relationship, its beneficial nature, or the detriment likely to result from its termination, the issue on appeal turns on a failure of proof and

"the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law." (*In re I. W.*, *supra*, 180 Cal.App.4th 1517, 1528.)

When the juvenile court finds a beneficial parent-child relationship and then considers whether exceptional circumstances compel the conclusion that the benefits of adoption would be outweighed by detriment to the child from terminating the legal parent-child relationship, we review that determination for abuse of discretion. (*In re Bailey J.*, *supra*, 189 Cal.App.4th 1308, 1315.) The detriment finding is based on facts but is not primarily a factual issue. "It is, instead, a 'quintessentially' discretionary decision, which calls for the juvenile court to determine the *importance* of the relationship in terms of the detrimental impact that its severance can be expected to have on the child and to weigh that against the benefit to the child of adoption." (*Ibid*.)

It is the appellant's burden on appeal to establish prejudicial error. (*In re L. Y. L.* (2002) 101 Cal.App.4th 942, 947; *In re Megan S.* (2002) 104 Cal.App.4th 247, 251.)

B. MOTHER HAS NOT ESTABLISHED A COMPELLING REASON TO AVOID TERMINATION

Mother argues that the juvenile court erred in finding that she "had failed to meet her burden of establishing regular visitation" with Minor. Although the juvenile court stated, "It is clear that [Minor] and [Mother] ha[ve] shared frequent and loving visits, although at times inconsistent," irregularity of visitation was not a factor the juvenile court relied on to conclude that Mother had failed to show that she "occupies a parental role in the life of the child. And, finally, continuing this relationship outweighs any of the benefits that adoption affords." In this case, the juvenile court essentially found there was a loving relationship between Minor and Mother, but its benefits were not those of a parental relationship and were not so compelling as to preclude adoption.

Mother further contends that, "under the preponderance of the evidence standard, [she] presented sufficient evidence that there was a beneficial parental relationship and

that there was a compelling reason to decide termination of that relationship would be detrimental to [Minor]."

This court has frequently quoted with approval the seminal observations of the Fourth District Court of Appeal in *In re Autumn H.* (1994) 27 Cal.App.4th 567, 575, regarding the benefits available from a parental relationship.

> [W]e interpret the "benefit from continuing the [parent/child] relationship" exception to mean the relationship promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated. (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418; *In re Brittany C.* (1999) 76 Cal.App.4th 847, 853; *In re C. B.*, *supra*, 190 Cal.App.4th 102, 124.)
>
> Interaction between [a] natural parent and child will always confer some incidental benefit to the child ... . The exception applies only where the court finds regular visits and contact have continued or developed a significant, positive, emotional attachment from child to parent. (*In re Beatrice M.*, *supra*, at pp. 1418-1419; *In re Brittany C.*, *supra*, at p. 854; *In re Bailey J.*, *supra*, 189 Cal.App.4th 1308, 1315.)

As we have stated in *In re I. W.*, *supra*, 180 Cal.App.4th 1517, "the parent must show more than frequent and loving contact, an emotional bond with the child, or pleasant visits – the parent must show that he or she occupies a parental role in the life of the child." (*Id.* at p. 1527.) We recognize that it is difficult to occupy a typical parental role when a biological parent has been limited to supervised visits twice a week for two hours. "The exception does not require proof the child has a 'primary attachment' to a parent or the parent has 'maintained day-to-day contact' with the child." (*In re C. B.*, *supra*, 190 Cal.App.4th at p. 124, quoting from *In re S. B.* (2008) 164 Cal.App.4th 289, 299).) As another court has noted, the benefit of continued contact between a parent and child must be considered in the context of whatever limited visitation the parent was

allowed. (*In re Brandon C.* (1999) 71 Cal.App.4th 1530, 1537-1538 [upholding a juvenile court finding preserving a parent-child relationship and selecting guardianship as the permanent plan].)

Mother acknowledges that the juvenile court was most impressed by what it called the "credible and reliable" testimony of Meendering, On appeal, Mother asserts, "Ms. Meendering's opinion was clearly in stark contrast with the opinion of Dr. [Mangiameli], and like Dr. [Mangiameli]'s, was only based on her personally observing one visit between mother and daughter during the lengthy course of this case. [] The juvenile court erred in relying exclusively on Ms. Meendering's opinion and in finding it credible and reliable. [] The juvenile court also completely disregarded Dr. [Mangiameli]'s opinion without stating any reasons for doing so." (Record citations omitted.)

In arguing that she presented sufficient evidence of a compelling reason not to terminate her parental rights, Mother relies heavily on the testimony of Dr. Mangiameli. But it is not our role on appeal to reweigh the evidence. "It is the trial court's role to assess the credibility of the various witnesses, to weigh the evidence to resolve the conflicts in the evidence. We have no power to judge the effect or value of the evidence, to weigh the evidence, to consider the credibility of witnesses or to resolve conflicts in the evidence or the reasonable inferences which may be drawn from that evidence." (*In re Casey D.* (1999) 70 Cal.App.4th 38, 52-53.) Mother's appeal is essentially a request for this court to find her evidentiary presentation weightier than the juvenile court did.

Mother contends that this case is comparable to *In re S. B.*, *supra*, 164 Cal.App.4th 289, which rejected testimony like Meendering's. In reversing an order terminating a father's rights, the appellate court there concluded that the juvenile court erred when it found the continuing beneficial relationship exception did not apply. (*Id.* at p. 301.)

The father in *In re S. B.*, *supra*, 164 Cal.App.4th 289 suffered from combat-related posttraumatic stress disorder as a result of serving in Vietnam. His treatment included therapy and psychotropic medications. (*Id.* at p. 294.) He had also been using

methamphetamine on and off for 30 years after the war. His three-year-old daughter was removed from his custody and placed with her maternal grandparents after he and her mother were arrested on drug-related charges. (*Id.* at p. 293.) At the 12-month review hearing, the father was in full compliance with his case plan, maintaining sobriety and consistently visiting his daughter as much as allowed. (*Id.* at pp. 293, 298.) The father continued to visit his daughter up until the 18-month review hearing and they had affectionate interactions. (*Id.* at p. 295.)

While there are some factual similarities with our case, we also note significant dissimilarities. The father in *In re S. B.* promptly became and remained sober after the removal of his daughter and maintained consistent visitation. Further, "[t]he Agency's recommendation to terminate parental rights was based in part on the grandparents' intent to continue [the father's] visits with S. B." if they were approved for adoption after termination of parental rights. (*In re S.B.*, *supra*, at p. 295.) The appellate court stated, "We do not believe a parent should be deprived of a legal relationship with his or her child on the basis of an unenforceable promise of future visitation by the child's prospective adoptive parents." (*Id.* at p. 300.)

> As we pointed out in *In re C. B.*, *supra*, 190 Cal.App.4th 102, 125:
>
> The same appellate court that decided *In re S. B.* subsequently stated in a different case: "The *S. B.* opinion must be viewed in light of its particular facts. It does not, of course, stand for the proposition that a termination order is subject to reversal whenever there is 'some measure of benefit' in continued contact between parent and child." (*In re Jason J.* (2009) 175 Cal.App.4th 922, 937.)

The court that authored *In re S.B.* again limited the breadth of that decision in a later case, stating:

> "[W]e once again emphasize that *S.B.* is confined to its extraordinary facts. It does not support the proposition a parent may establish the parent-child beneficial relationship exception by merely showing the child derives some measure of benefit from maintaining parental contact." (*In re C. F.* (2011) 193 Cal.App.4th 549, 558-559.)

Mother renews on appeal her claim that it is significant that Minor "was never told that adoption by the NREFM could mean that she would never see her mother, sister, or other biological family members again." Section 366.26, subdivision (h)(1) states: "At all proceedings under this section, the court shall consider the wishes of the child and shall act in the best interests of the child." There are limits to what courts should do to ascertain a child's wishes. As the court articulated in *In re Leo M.* (1993) 19 Cal.App.4th 1583, "To ask children with whom they prefer to live or to ascertain what they wish through other evidence is one thing. To ask those children to choose whether they ever see their natural parent again or to give voice to approving that termination is a significantly different prospect. We must have regard for the possible and readily conceivable anguish that such confrontational choices could create in a short lifetime already filled with trauma … ." (*Id.* at p. 1593.)

While the juvenile court was required to consider Minor's wishes as part of its best interests analysis, the court was not required to ask Minor directly about her wishes nor to inform her of the legal significance of the court's decision.

V. DISPOSITION

The order terminating parental rights is affirmed.

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Grover, J.

WE CONCUR:

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Rushing, P. J.

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Márquez, J.

In re D.S.; DFCS v N.J. et al.
H041611